TAN SRI DATO' VINCENT TAN CHEE YIOUN

v.

HAJI HASAN BIN HAMZAH & 6 ORS.

HIGH COURT MALAYA, KUALA LUMPUR
DATUK HAJI MOKHTAR BIN HAJI SIDIN J.
[CIVIL CASE NO. S5-23-23-94]
5 DECEMBER 1994

TORT: *Defamation - Libel - Natural and ordinary meaning of words used - Whether defamatory - Innuendos - Meaning of - Whether words used capable of giving rise to innuendos.*

TORT: *Defamation - Libel - Assessment of damages - Principles to be applied -Plaintiff a prominent businessman - Whether a relevant factor -Defence of justification and fair comment - Failure of defence - Effect - Whether damages would be colossal.*

This was an action for libel in respect of four articles appearing in a magazine called "Malaysian Industry" which the plaintiff alleged had defamed him. The second to the fifth defendants were the respective writers of the said articles while the first defendant and the sixth defendants were the publishers thereof. The seventh defendant was sued as the printer of the magazine.

The plaintiff alleged that by the said articles the defendants had vilified his person and character and had destroyed his commercial reputation as a prominent businessman. By virtue of his standing in the business world and the extent of reputational damage suffered by him herein, the plaintiff contended that he was entitled to RM20 million as damages and claimed that quantum from the defendants. The facts showed however that apart from the seventh defendant, none of the defendants had filed their defence to the claim. Before the learned Judge the primary issue that arose was whether the words as used in the articles aforesaid, in their natural and ordinary meaning, or by way of innuendo, were in fact defamatory of the plaintiff and if so, whether the plaintiff was entitled to the damages sought for.

Held:

[1] Although no defence had been filed and therefore the defendants were deemed to have accepted the claim of the plaintiff, the Court is still dutybound to consider whether the relevant statements are defamatory of the plaintiff. The Court, in other words, has to consider the natural and ordinary meaning of the words used in the said articles and determine whether they are capable of conveying a meaning defamatory of the plaintiff. This is a question of law.

[2] The relevant passages of the four articles herein, given their natural and ordinary meaning, each by themselves and cumulatively, are untrue and defamatory of the plaintiff and have lowered the plaintiff in the estimation of right thinking members of society generally and brought him into public contempt and ridicule. The defamatory words have also produced an adverse impression of the plaintiff upon the minds of fair and reasonable persons and were calculated to disparage and discredit the plaintiff personally in his reputation and in his trade or business carried by him. The defendants who had participated or authorised the publication of the libel in the said magazine are all jointly and severally liable for the publication of the libel.

[3] There is no doubt in this case that a very serious libel has been perpetrated on the plaintiff, who is a prominent businessman recognised not only in Malaysia but internationally. Bearing in mind the principles applicable in the assessment of damages, and considering too the position and standing of the plaintiff, the gravity and seriousness of the libel, the mode and extent of the publication as well as the absence of any correction, retraction or apology on the part of the

defendants, the award to be given must necessarily be such as to convince any person of the baselessness of the libel and act as a sufficient signal to the public at large of the full vindication of the plaintiff's reputation both in Malaysia and internationally. In the premises the following damages are ordered:

(1) Against the first defendant: General damages of RM3 million

(2) Against the second defendant: General damages of RM750,000.

(3) Against the third defendant: General and aggravated damages of RM2 million. Aggravated damages has to be awarded here because the third defendant had relied on justification and fair comment which he failed to establish and also because the third defendant had repeated the libel in Court.

(4) Against the fourth defendant: General damages of RM 1 million.

(5) Against the fifth defendant: General damages of RM 250,000. This Court has taken into account that the fifth defendant had apologised three times in open Court.

(6) Against the sixth defendant: General damages of RM 2 million.

(7) Against the seventh defendant: General damages of RM 1 million.

[Judgment for the plaintiff]

Cases referred to:
Jones v. Skelton [1963] 63 SR (NSW) 644 at 650 ***(refd)***
Lewis v. Daily Telegraph [1963] 2 ALL ER 151 ***(refd)***
*Cooper v. Warburton [1931] 44 BCR 328 (SC)****(refd)***
Adam v. Ward [1917] AC 309 ***(refd)***
Digby v. Financial News Ltd. [1907] 1 KB 502 ***(refd)***
Associated Leisure Ltd. & Ors. v. Associated Newspaper Ltd. [1970] 2 ALL ER 754 ***(refd)***
Associated Leisure Ltd. (Phonographic Equipment Co. Ltd.) & Ors. v. Associated Newspaper Ltd. [1970] 2 QB 450 ***(refd)***
Pervan v. The North Queensland Newspaper Company Ltd. & Anor. [1993] 117 ALR 569 ***(refd)***
Joshua Benjamin Jeyaretnam v. Goh Chok Thong [1989] 3 MLJ 1 ***(refd)***
Hoste v. Victoria Times Publishing Co. [1889] 1 BCR 365 ***(refd)***
Ward v. Lewis [1955] 1 WLR 9 ***(foll)***
Carson v. John Fairfax & Sons Ltd. [1993] 113 ALR 577 ***(refd)***
*McCarey v. Associated Newspapers Ltd. (No. 2) [1965] 2 QB 86 at 104-105 (CA)****(refd)***
Cassel & Co. v. Broome [1972] 1 ALL ER 801 ***(refd)***
Neeld v. Western Broadcasting Co. [1976] 65 DLR (3d) 574 at 576 (BCSC) ***(refd)***
Associated Newspaper v. Dingle [1964] AC 371 at 399 ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 7

Other sources referred to:
A Digest of the Law of Libel and Slander, by Odgers, 3rd Edn. p. 1
Libel and Slander, by Gatley 8th Edn. paras 94, 1333, 1451

For the plaintiff - V.K. Lingam; M/s. V.K. Lingam & Co.
Adam Bachek; (Satchithanandan with him) M/s. Adam Bachek & Ass.
For 1st and 6th defendant - Noor Zilan Mohamed Noor; T/n. A.J. Hamzah & Co.
For the 3rd defendant - Karpal Singh (M. Manoharan with him); M/s. Karpal Singh & Co.
For the 7th defendent - Ram Dhari; M/s. K.C. Yap Kamaluddin & Partners

JUDGMENT

Haji Mokhtar bin Haji Sidin J:

At the end of the trial on 15 October 1994, I had reserved judgment for a week. I had then delivered an oral judgment in open Court on 22 October 1994 but could not make available a copy of the judgment because they were handwritten. Since then the judgment has been typed and I now make it available to the parties.

The plaintiff in this case is one Tan Sri Dato Vincent Tan Chee Yioun, a businessman. He is and was at all material times the group chief executive officer of Berjaya Group Berhad which is a company listed on the Kuala Lumpur Stock Exchange. The plaintiff is also the group chief executive officer of Berjaya Industrial Berhad, Berjaya Textiles Berhad, Berjaya Leisure Berhad, Berjaya Sports Toto Berhad and Berjaya Singer Berhad. (These companies together with Berjaya Group Berhad are hereinafter referred to as "the Berjaya Group of Companies").

The plaintiff claims against all the seven defendants that they had either individually or in combination among themselves and/or with persons unknown conspired by way of a systematic publication of articles vilifying the person and character of the plaintiff with the object of destroying the plaintiff's personal and commercial reputation and his business career and position as the group chief executive officer of the Berjaya Group of companies. The action by the plaintiff against the defendants is for libel, damages for tort of conspiracy, aggravated and/or exemplary damages, an injunction to restrain the defendants and each of them by themselves, their servants or agents, or in combination or otherwise howsoever from further publication and perpetration of the said libel or any similar or like libel of or concerning the plaintiff.

The first defendant is and was at all material times the publisher and editor-in-chief of the monthly magazine called the "Malaysian Industry" (hereinafter called "the said magazine"). The second defendant was a contributor and/or a staff writer of the said magazine. The third, fourth and fifth defendants are and were at all material times contributors of the said magazine. The sixth defendant is and was at all material times the publisher and/or proprietor of the said magazine. The seventh defendant was the printer of the said magazine.

The particulars of the libel was published in August 1993 October 1993 and January 1994 issues of the said magazine. The particulars of the libel as pleaded in the statement of claim appeared under four separate articles in the three issues of the said magazine. The first are as pleaded in paragraph 8 of the statement of claim which appeared in the August 1993 issue written by the second defendant under the heading "Vincent Tan's Media Forays". The offensive words are contained in the following sentences which are extracted from separate paragraphs of the article:

> ... The media's ability to mould public opinion whetted the appetite of corporate predators. The most visible is Tan Sri Vincent Tan ...
>
> All the excitement was related to The Sun, a daily tabloid-size newspaper which made its debut in June. What made the event particularly intriguing was that the man behind The Sun was none other than Vincent Tan ...
>
> .... Tan's decision was also governed by his relatively poor public image which stemmed from his various business manoeuvres ...
>
> .... suddenly conscious of the enormous power wielded by the local press and the apparent immunity enjoyed by business houses involved in the media industry, Vincent began an earnest search for a newspaper ...

Vincent's media dealings first became public knowledge when he acquired a 20% stake in the highly successful Star newspaper. This advanced the idea that Tan was keen on getting a foothold in the local media, in line with his vague proposal to "focus on other activities ...

While his stake did not give him total control, it was quite substantial and sufficient to influence the business pages at a time when he was expanding his business empire. Subsequently Tan moved into the monthly magazine Corporate World ...

But internal squabbles saw Yong breaking off his ties with the Berjaya Group just like his equally dynamic predecessor Patrick Low ...

All available evidence up to the end of 1992 suggest Vincent Tan's active involvement in newspaper publishing and media-related business ...

But then there is also the feeling that it is "absurd for an industrialist to start a newspaper simply to push his own or those of his Company ...

The second article appeared in October 1993 issue of the said magazine written by the third defendant under the heading of "Press Manoeuvres". The offensive words which the plaintiff claims to be libellous are pleaded under paragraph 11 of the statement of claim which are as follows:

Other corporate figures acquire media organisations to further their own interests. Launched with great fanfare, The Sun faded swiftly, becoming a vehicle for furthering the interests of its principal backer, Tan Sri Vincent Tan of the Berjaya Group. The paper began with great promise, printing political gossip and news that the other newspapers ignored. But the notion that it would be an alternative voice was quickly disabused ...

P. Tamilmani, the fiery editor of a Tamil weekly, Thoothan, went on a hunger strike in July to protest the Anti Corruption Agency's (ACA) results in the investigation of Dato' Seri S. Samy Vellu. The Sun stood alone in reporting this incident. Following that, Tan Sri Vincent called another meeting of his editorial staff and complained that the paper was preventing him from getting government contracts since approval for some of his projects had to come from Samy Vellu. Vincent warned that Vellu was not to be criticised anymore. As a result, The Sun was reduced to being an in-house paper for the Berjaya Group. Vincent's insistence that the paper "not criticise his friends or praise his enemies" saw four senior members of the editorial staff resigning in protest ...

Together with this article a coloured photograph of the plaintiff appeared with the caption "Vincent Tan: Warned Journalists" under it.

The third article appeared in January 1994 issue of the said magazine written by the fourth defendant under the heading "Berjaya Industrial/Textile Shares Sale Unanswered Question?". The particulars of the offensive words which the plaintiff claimed to be libellous appeared in paragraph 14 of the statement of claim which are as follows:

The KLSE, in an effort to control excessive speculation, quickly declared the counter as "designated securities". It took the heat out of trading but what investors missed, say stock analysts, was the 'private placement of a large chunk of Berjaya Textile shares just prior to its suspension and the price it was sold for ...

But what came as a bigger surprise to share analysts was the sale of an additional 15.8 million BT shares on November 22, a day before the request for suspension was made. The sale of 30 million BT shares at prices between RM3.80 and RM4.98 subsequently lowered BIB's stake in BT to only 27.3 million shares representing 38% equity compared to its 72% earlier ...

These shares manoeuvres have predictably drawn the ire of a section of research analysts in several stockbroking firms. The big question: why the sale and to whom did the 30 million Berjaya Textiles shares go to? Says an analyst, "The 30 million shares could have gone to anybody within

the company using a nominee. Such share transactions could not have taken place without the approval of Vincent Tan. Why sell at such low price of RM3.80 just days before a bullish corporate announcement? It's simply very unethical ...

Instead, say analysts, at RM10 a share, BT shareholders stand to lose almost RM300 million because of the private placement of the 30 million shares. "When shareholders act dumb they are treated like it," added a visibly annoyed research chief referring to the development in the two companies ...

Together with this article a coloured photograph of the plaintiff appeared with the caption "Vincent Tan: Unethical?".

The fourth and last article also appeared in the January 1994 issue of the said magazine under the heading “Financial Analysis/Berjaya Textile Probing" written by the fifth defendant. The particulars of the offensive words which the plaintiff claimed to be libellous are pleaded under paragraph 17 of the statement of claim which are as follows:

Jaya Tiasa has an initial 5-year log supply contract with Rimbunan Hijau Sdn. Bhd., the flagship company of Sarawak timber baron Datuk Tiong Hiew King, who was widely acclaimed as Asia's biggest timber tycoon owning an estimated 800,000 hectares of timber concessions ...

The interesting question to ponder is: what is the rationale of giving away Berjaya Textile to Jaya Tiasa? Could there by some under-the-counter deals between the Tiong family and Tan Sri Dato Vincent Tan? The Tiong family is seen to be the party who will benefit substantially from the deal. This will in effect be a back door listing for the timber concern ...

The whole deal sounds like a 'win-win' arrangement between Datuk Tiong's family and Tan Sri Vincent Tan. But what about the small shareholders of Berjaya Textile?

Together with this article a coloured photograph of the annual report of Berjaya Textiles Berhad appeared with the caption of "A win-win situation for Vincent Tan".

From the record it appears that only the seventh defendant filed its defence. I will deal with this later. The first defendant to the sixth defendant did not file their defence though the writ and the statement of claim were served on them sometime in February and March 1994. There is no application by any of them to extend the time to file their defence. Though the first, second, third, fifth and sixth defendants appeared at the hearing, there was no application by any of them to ask for time to file for the defence. The only application made by the second, third and fifth defendants was to get an adjournment in order for them to engage a Counsel to appear on their behalf in Court as their previous solicitors, A.J. Hamzah & Co. wanted to discharge themselves. As such for all intents and purposes there is no defence filed by these defendants. Since no defence had been filed the defendants are deemed to admit the averments pleaded by the plaintiff. Though the first, second, third, fifth and sixth defendants gave evidence in Court, I have allowed them to do so only for the purposes of mitigating the damages against them and not evidence as to their defences. It must be noted that the sixth defendant (who is in actual fact the first defendant) appeared through a Counsel, and the second, third and fifth defendants are writers and educated persons, I see no reason or any excuse for them not to file their defence when it is clear in the writ that to answer the claim they must file their defence within a certain period. This has not been done. The fourth defendant did not file his statement of defence nor did he appear in Court.

The plaintiff gave evidence at great length to establish to the Court why those articles are offensive, derogatory, destructive and defamatory of and concerning him. He was cross-examined by the defendants who appeared at the trial. It was pleaded by the plaintiff that each of the four articles in their natural and ordinary meaning or alternatively by way of innuendo had gravely defamed him and brought him into public ridicule, odium and contempt and as such he

has suffered irreparable damage and injury to his personal integrity, commercial reputation and credit. It was also pleaded by the plaintiff that he has been grossly damaged in his office, profession, calling, trade or business held or carried on by him as chairman and group chief executive officer of Berjaya Group of Companies.

The defendants when they gave evidence in Court admitted writing, publishing and printing those articles. Though the plaintiff had contended that the statements in those articles are defamatory and no defence had been filed except by the seventh defendant, the Court has a duty to consider and determine whether those statements are defamatory of the plaintiff. In determining this the Court has to consider the natural and ordinary meaning of the words used in the articles and determine whether they are capable of conveying a defamatory meaning of and concerning the plaintiff. This is a question of law for the Court to decide as clearly held by the Privy Council in the case of *Jones v. Skelton* [1963] 63 S.R.(N.S.W.) 644 at 650:

> It is well settled that the question as to whether words which are complained of are capable of conveying a defamatory meaning is a question of law and is therefore one calling for decision by the Court ...
>
> The test according to the authorities is whether under the circumstances in which the writing was published, reasonable men to whom the publication was made would be likely to understand it in a libellous sense. The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning; any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words. See *Lewis v. Dally Telegraph* [1963] 2 ALL ER 151. The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

What are defamatory words? **Odgers** in his book **A Digest of the Law of Libel and Slander**, Stevens & Sons Limited [1896], 3rd Edition, at page 1 has stated:

> No man may disparage or destroy the reputation of another. Every man has a right to have his good name maintained unimpaired. This right is a jus in rem, a right absolute and good against all the world. Words which produce, in any given case, appreciable injury to the reputation of another are called Defamatory. Defamatory words, if false, are actionable. False defamatory words, if written and published, constitute a libel; if spoken, a slander. Words which on the face of them must injure the reputation of the person to whom they refer, are clearly defamatory, and, if false, are actionable, without proof that any particular damage has followed from their use.

Though this is a very old book but what is meant by defamatory is still applicable today and that is the principle and is the basis for me to decide in the present case. Thus in the case of *Lewis v. Daily Telegraph Ltd.* [1963] 2 ALL ER 151 at page 154 the House of Lords held:

> There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs ...
>
> What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But the expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning.

Further down at page 169 the House of Lords held:

> My Lords, the natural and ordinary meaning of words ought in theory to be the same for the lawyer as for the layman because the lawyer's first rule of construction is that words are to be given their natural and ordinary meaning as popularly understood. The proposition that ordinary words are the same for the lawyer as for the layman is, as a matter of pure construction, undoubtedly true. But it is very difficult to draw the line between pure construction and implication, and the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and, unfortunately, as the law of defamation has to take into account, is especially prone to so when it is derogatory.

What is the meaning of legal innuendos? This is clearly explained in **Gatley on Libel and Slander** (8th edition) at paragraph 94 which states as follows:

> 94. **Legal innuendos**. However, words may convey a defamatory imputation only by reason of some special knowledge available to those to whom they are published, of the circumstances of publication, or of some special meaning or inference to be attached to or drawn from the words. The words are then said to carry an innuendo. In such a case the question is what meaning would be attached to the words by a reasonable man having special knowledge of any relevant facts of meaning.
>
> In the case of *Cassidy v. Dail Mirror Newspaper* [1929] 2 KB 331 at page 354 Russell LJ. held that liability of libel does not depend on intention of the defamer, but on the fact of defamation. On the issue of the meaning conveyed by the publication in question, it is irrelevant to consider the meaning the writer and publisher intended to convey. In fact the question of meaning is to be determined by an objective test. In *Lee v. Wilson and MacKinnon* [1934] 51 CLR 276 at page 288 Dixon J. held that:

The cause of action consists in publication of the defamatory matter of and concerning the plaintiff. It might be thought, therefore, that in any event, this warranted or required some investigation of the actual intention of the publisher. But his liability depends upon mere communication of the defamatory matter to a third person. The communication may be quite unintentional, and the publisher may be unaware of the defamatory matter.

The same principle is stated in the case of *Cooper v. Warburton* [1931] 44 BCR 328 (S.C.) at page 329 where Morrison CJ said:

> It is immaterial whether or not the defendant meant the words to be defamatory. The question is whether the words he used were calculated to convey a disparaging imputation.

In the case of *Adam v. Ward* [1917] AC 309 at page 318 it was held that malice can be implied from mere publication of the defamatory matter, unless the publication was on what is called a privileged occasion.

Bearing the above principles in mind let me now examine the articles individually.

The First Article:

I have taken great pain to read and peruse the article written by the second defendant which appeared in August 1993 issue of the said magazine with particular reference to the passages alleged to be libellous in the context of the article read as a whole. The article states that the plaintiff's involvement in The Sun newspaper was aimed to change his poor public image arising from his various business manoeuvrings. The article also conveys the message to mean that the plaintiff had acquired a 20% equity in The Star newspaper in order to exercise improper and undue influence on the business pages of The Star at a time when he was expanding his business empire. It appears to me that the article in its natural and ordinary meaning conveys to the reader

that the reason for the plaintiff to acquire the equity in the media business was in order to enjoy immunity from the law. In my view the article also conveys the meaning that the plaintiff was motivated by selfish interests and also carried the innuendo that the plaintiff has abused his position as the group chief executive officer of the Berjaya Group of Companies in that the investment in The Sun and The Star newspapers was motivated solely for personal gain with the objective of improving his unclean public image. The article appears to indicate that there are internal squabbles in the Berjaya Group of Companies between the plaintiff and the Group executive director, Yong Teck Ming, which the article claimed that the latter had broken his ties with the Group. This was denied by the plaintiff and there is no evidence to show otherwise. Upon reading those passages I could not help but come to the conclusion that the article particularly those passages which I have stated above are defamatory of the plaintiff and/or carry the innuendos pleaded in the statement of claim.

The second defendant when he gave evidence (which I have stated was solely for the purpose of mitigation because no defence had been filed) indirectly admitted that the words do convey such defamatory meaning. His excuse was what was printed was not what he had written which it appears to be the only mitigating factor. Since the article is stated to be written by him he should have taken steps to ensure that what had been published is what he has written and not leave it entirely to the editor. Further he admitted that he read the article immediately after it was published and he did not do anything about it. If he discovered that the words in the article were not wholly written by him which I do not accept as reliable and true, he should have taken all reasonable steps to correct and remedy the situation such as tendering his apology publicly.

The Second Article:

On reading the second article which was written by the third defendant I could not help in coming to the conclusion that there is a close relationship and a common sting between this article and the first article when this article questioned the wisdom of the plaintiff in acquiring the equity in The Sun newspapers. Though the two articles were written by two different writers, they convey the meaning that the plaintiff is manoeuvering the mass media to enhance his personal reputation and further his personal business interests.

I have read the second article under the heading "Press Manoeuvres" in the said magazine. This article is superimposed with a coloured photograph of the plaintiff with the caption "Vincent Tan: Warned Journalists". The defamatory words are contained in two passages of the article. Reading this article as a whole I find that it ridicules the plaintiff as a corporate figure who was involved in The Sun newspaper with the ulterior motive of furthering his own personal business interests and further carried the innuendo that he was unscrupulous in manoeuvering the editorial staff of the said newspaper by making them subordinate to his personal business interests. Further the ariticle alleged that the plaintiff had reduced the said newspaper to be an in-house paper for the Berjaya Group. It is also alleged by the said article that the plaintiff had insisted that the said newspaper should not criticise his friends nor praise his enemies, which in my opinion carried the innuendo that the plaintiff was exploiting the said newspaper as a tool for his own commercial interests. It is also stated that due to the criticism of Dato' Seri Samy Vellu, the Minister for Energy, Telecoms and Posts by the said magazine the plaintiff and his group of companies lost several contracts. The article went further in stating that the plaintiff had directed the staff of the said magazine not to criticise the said Dato' Seri Samy Vellu.

The third defendant when he gave evidence in Court was adamant that the defamatory passages in the article was written and published by him in the said magazine were true. He relied on the plea of justification and fair comment. Since he has not filed his defence, the defence of

justification and fair comment comes to nought. Even if he has filed his defence the onus of proving that what is written inside is true and a fair comment is upon him. This is clearly stated in the case of *Digby v. Financial News Ltd.* [1907] 1 KB 502 where it was held (at page C 509) that the onus is on the defendant to prove that the charges made are true in substance and in fact and in order to succeed in a defence of justification, he must prove the truth of the words complained of not only in their literal meaning but in their inferrential or innuendo meanings as the jury may find the words to bear. Lord Denning MR. in the case of *Associated Leisure Ltd. and Ors. v. Associated Newspapers Ltd.* [1970] 2 ALL ER 754 at page 757 said:

> I am sure Devlin J. did not wish in any way to detract from the rule, well settled, which I will read from Gatley:
>
> > A defendant should never place a plea of justification on the record unless he has clear and sufficient evidence of the truth of the imputation, for failure to establish this defence at the trial may properly be taken in aggravation of damages.
>
> I have always understood such to be the duty of counsel. Like a charge of fraud, he must not put a plea of justification on the records unless he has clear and sufficient evidence to support it.

In the case of *Associated Leisure Ltd. (Phonographic Equipment Co. Ltd.) and Others v. Associated Newspapers Ltd.* [1970] 2 QB 450 at page 455 Lord Denning said:

> The defendants, in putting this plea of justification on the record, run a very grave risk. If it fails, the damages, which might otherwise have been modest, would now be collosal.

The third defendant in his evidence stated that what was written was true. He went further by saying that this was from reliable sources but he refused to reveal the sources and refused to prove the allegations stated in the article. He insisted that he stands by whatever he wrote and went on to say that if this means that he will be liable, so be it. In my view, even if he has filed his defence, the defence of justification would surely fail. In view of his failure to substantiate the defamatory allegations, the allegations remain unproved and untrue. Similarly, since the basic facts upon which the comments are based are not true, the defence of fair comment will not succeed as clearly stated in the case of *Pervan v. The North Queensland Newspaper Company Ltd. & Anor* [1993] 117 ALR 569 at page 575 where the High Court of Australia held:

> The plaintiff says it cannot be fair comment because it is founded on untrue statements. No doubt when there is one published document in which the writer partly alleges and partly comments, and of which the sum total is defamatory, the document cannot be justified unless the facts are true and the comment fair; because if the facts do not warrant defamatory comment the comment is not fair, and if the facts as alleged warrant defamatory comment they are defamatory and must be proved to be true.

Further in the case of *Joshua Benjamin Jeyaretnam v. Goh Chok Thong* [1989] 3 MLJ 1 the Privy Council held:

> It is of course well established that a writer may not suggest or invent facts and then comment upon them, on the assumption that they are true. **If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail. The commentator must get his basic facts right.** (Emphasis is mine).

It is clear to me from the evidence that the third defendant has not got his basic facts right and since he is unable to prove them to be true, the defence of fair comment cannot succeed.

In view of the above I am of the view that the words complained of and written by the third defendant are defamatory of the plalntlff and/or carry the innuendo as pleaded in the statement of claim.

The Third Article:

The third article is entitled "Berjaya Industrial/Textile Shares Sale, Unanswered Questions?" which appeared in January 1994 issue of the said magazine. It was written by the fourth defendant. The article appeared in the said magazine together with a coloured photograph of the plaintiff with the caption "Vincent Tan: Unethical?" The passages in this article which were referred to by the plaintiff as being defamatory by the plaintiff potrayed the plaintiff as a man with a sordid reputation who juggled the sale of 30 million Berjaya Textiles shares using a nominee within Berjaya Textile Berhad and in doing so the plaintiff was guilty of duplicity and had abused his position as the group chief executive officer of Berjaya Group of Companies. The words complained of also carried the innuendo that the plaintiff was an unprincipled and dishonourable businessman who was in breach of his fiduciary duties to the shareholders of Berjaya Textiles Berhad and was an unscrupulous person who acted in collusion with a nominee in the company. Further the unscrupulous and dishonourable conduct of the plaintiff had caused the shareholders of Berjaya Textiles Berhad to lose RM300 million. The plaintiff had denied this and has given evidence that the shareholders had gained because of this takeover and there is no evidence to the contrary.

The writer of this article, the fourth defendant, neither did he file his defence nor did he appear in Court to answer the writ. I have the opportunity of reading the article and I find that the article and the passages referred to in their ordinary and natural meaning and/or by way of innuendo are defamatory of the plaintiff.

The Fourth Article:

The fourth article also appeared in January 1994 issue of the said magazine. This article was written by the fifth defendant entitled "Financial Analysis/Berjaya Textiles Probing" is somewhat related to the third article. Together with this article a coloured picture of the cover of the Berjaya Textile Berhad annual report appeared with the caption "A Win-Win Situation for Vincent Tan".

The passages in this article are heavily punctuated with question marks. For example, it states:

> ... the interesting question to ponder is: what is the rationale of giving away Berjaya Textile to Jaya Tiasa? Could there be some under-the-counter deals between the Tiong family and Tan Sri Dato' Vincent Tan? ... the whole deal sounds like a "win-win" arrangement between Datuk Tiong's family and Tan Sri Vincent Tan. But what about the small shareholders of Berjaya Textile?".

Such question marks in the sentences highlighted above will give the reasonable reader an impression that there has been some impropriety and adopt a suspicious approach to the matter. This was emphasised by the High Court of Australia in the case of *Pervan v. The North Queensland Newspaper Company Ltd. & Anor.* [1993] 117 ALR 569. At page 598 the Court held:

> In *Jones v. Skelton*, the Privy Council said of a statement concerning a councillor which was followed by a question mark:
>
> > The question mark might convey to the reasonable reader the thought and the meaning that there had been some impropriety. The reader, a jury might conclude, was invited to adopt a suspicious approach and so to be guided to the real explanation of what had taken place - an explanation which the writer of the letter did not care or did not dare to express in direct terms.
>
> Similarly in the present case, I think that an ordinary reader would think that the question marks at the end of the first and second sentences in the advertisement indicated that there was something suspicious about the conduct of the councillors which needed investigation.

I have carefully considered the article and the relevant passages pointed out by the plaintiff. It is clear to me that the article and the passages are defamatory of the plaintiff. It appears to me on reading this article and the passages the natural meaning is that the plaintiff had connived and conspired with one Dato' Tiong Hiew King in the sale of Berjaya Textiles to Jaya Tiasa Plywood and that Dato' Tiong Hiew King's family and the plaintiff will benefit from the deal at the expense and to the detriment of the Berjaya Textiles shareholders.

I also find that the words complained of carry the innuendo that the plaintiff is an unscrupulous and dishonourable businessman who engages in dubious, underhand and illegal deals to benefit himself and therefore he is unfit and unworthy to hold the position of group chief executive officer of Berjaya Textiles Berhad and the Berjaya Group of Companies.

The fifth defendant in his evidence agreed that upon reading the article and the relevant passages they are defamatory of the plaintiff. Just like the second defendant, the fifth defendant claimed that the article appearing in the said magazine was not what he wrote. He claimed that the original article that he wrote was heavily edited and inserted by the editor. Though he read the article soon after it was published and realised that certain passages are defamatory of the plaintiff, he did not take any step to remedy the situation, such as correcting the article or retracting the article or tendering an unqualified apology to the plaintiff. He told the Court that he did ask the editor and the first defendant to offer an unqualified apology on realising that the article is defamatory of the plaintiff. Though the said magazine published an apology to the plaintiff, it appears to me upon reading the apology, that the apology was a qualified apology. It appears to me that the fifth defendant regretted and he had offered his apologies in Court. Since the apology came late he is still liable under the law. The three apologies may in a way help him to mitigate the damages to be awarded against him.

From the evidence it is clear to me that each of the four articles and the relevant passages within are defamatory of the plaintiff. In my view the plaintiff has proved his case against the writers of the four articles.

Now let me turn to the other three defendants. The first defendant as I have stated earlier is the publisher as well as the editor-in-chief of the said magazine. The sixth defendant is the publisher of the said magazine and is for all intents and purposes the first defendant himself. The first defendant did not file his defence nor did he file on behalf of the sixth defendant. Anyway, in his evidence on behalf of himself and on behalf of the sixth defendant, he admitted that all the articles were libellous of the plaintiff. He offered the excuse that he had left the responsibility to edit those articles to the editor before they were printed and published in the said magazine. He told the Court that on discovering the four articles to be libellous he told the editor to make an apology. He also told the Court that he had made an apology which appeared in the March 1994 issue of the said magazine under the column "Letters to the Editor". It appears to me that the apology was a conditional apology since it contained the words "if the said articles had tarnished the reputation of the plaintiff". The first defendant informed the Court that he had dismissed the editor of the said magazine. The first defendant also stated that he met the plaintiff twice at the airport and apologised to him. What tantamounts to an effective apology? The requirements of an effective and adequate apology were aptly summarised by Begbe C.J. in *Hoste v. Victoria Times Publishing Co.* [1889], 1 BCR 365 at 366 where he said:

> That [the apology] is surely not sufficient. It is not the offer nor even the publication of an apology at all, but an offer to offer an apology. And even in terms, it seems to reserve to the defendant a right of judging whether the plaintiff is reasonable in demanding any particular form e.g., it offers to make an apology as the defendant thinks fit. Such an apology as merely "beg your pardon", or "sorry for it", is not sufficient in a case of libel. The defendant should admit that the charge was

> unfounded, that it was made without proper information, under an entire misapprehension of the real facts, etc., and that he regrets that it was published in his paper ... You should not offer to make, but actually make and publish at once, and unconditionally, such an apology, expressing sorrow, withdrawing the imputation, rehabilitating the plaintiff's character as well as you can; not stipulating that the plaintiff is to accept it; not making any terms but publishing it in the interest of truth, and because you are anxious to undo whatever harm which may have accrued from a wrong which you find you have been the unconscious instrument of inflicting. Then in your statement of defence you can state what you had done ... That is the only authority I know of making any reference to an apology in the pleadings. It will be for the jury to say whether it was a reasonable and proper apology, and whether it is sufficient to absolve the defendant from any or how much of the damage the plaintiff has suffered. Obviously some libels may inflict an injury and loss that no apology or retraction by, or even remorse of, the wretched, miserable, libeler can wholly efface.

Therefore, in my view the apology by the first defendant and the sixth defendant was not a full and frank withdrawal of the libel contained in those articles and neither was it a complete and unqualified apology or a fair retraction.

Now let me turn to the seventh defendant. This is the only defendant who has filed his statement of defence. In his defence he had pleaded innocent publication, justification, fair comment and privileged publication. The managing director of the seventh defendant, Mr. Loh Wing Sang, testified in Court. Though he had pleaded innocent publication, justification and other issues, Mr. Loh Wing Sang testified only on innocent publication and stated that he regretted in printing those articles in the said magazine. In my view in order to succeed in the defence of justification, fair comment and privilege he should adduce evidence in respect of these. Since he did not give any evidence on these issue, I hold that he had abandoned them. The defence of innocent publication is provided for in s. 7 of the Defamation Act 1957. Under this the seventh defendant has to show that the words complained of were published by him "innocently in relation to the plaintiff". In my view it cannot be said that he had published them innocently when those articles plainly referred to the plaintiff whose coloured photographs were inserted in the articles. Secondly, the defendant must make an offer of amends under sub-s. (2) which must be accompanied by an affidavit specifying the facts relied upon by the person making it to show that the words in question were published by him innocently in relation to the party aggrieved. These two conditions have not been met by the seventh defendant. As such his defence of innocent publication should fail. Mr. Loh Wing Sang admitted that on reading the articles they were libellous, he expressed his regrets. Anyway it is clear to me that the seventh defendant only printed three of the four articles. Since the seventh defendant had not been careful in its publication I find that the plaintiff has proved his case against the seventh defendant.

Thus I find that all the passages referred to in the four articles are defamatory of and concerning the plaintiff.

Conspiracy:

The plaintiff also pleads that each of the defendants had either themselves and /or in combination with others commenced a conspiracy by way of a systematic publication of articles vilifying the person and character of the plaintiff with the object of destroying the plaintiff's personal and commercial reputation and his business career and position as the group chief executive officer of the Berjaya Group of Companies. There is no difficulty for me to find that conspiracy exists in the first defendant and sixth defendant since they are the editor and publisher of those articles. I also find that there is no difficulty for me to find the conspiracy on the part of the seventh defendant since he is the printer of those articles.

As to the second, third, fourth and fifth defendants they claimed that they did not know each other before they wrote those articles. As I have stated earlier there appears to be a relativeness, a linkage and a common sting between those articles. The articles by the second and third defendants are on the same issues and the articles written by the fourth and fifth defendants are also of the same issues though different from the articles written by the second and third defendants. It appears to me that there has been a concerted agreement between and among the defendants of a predominent intention to injure and damage the plaintiff's personal and commercial reputation and personal career by the publication of the four defamatory articles in question which in fact has caused irreparable injury, harm and damage to the plaintiff. This is the common link in all the four articles. However, applying the principle in the case of *Ward v. Lewis* [1955] 1 WLR 9 the tort of conspiracy merges with the tort of defamation.

Finding of the Court:

I find that the relevant passages of the four articles each by themselves and cumulatively are untrue and defamatory of the plaintiff and have lowered the plaintiff in the estimation of right thinking members of society generally and brought him into contempt, hatred and public ridicule. I further hold that the said defamatory words have produced an adverse impression of the plaintiff upon the minds of fair and reasonable persons and were calculated to disparage and discredit the plaintiff personally in his reputation and in his trade or business held and carried on by him.

The defendants who had participated or authorised the publication of the libel in said magazine are all jointly and severally liable for the publication of the libel and therefore all the defendants are *prima facie* liable.

Damages:

I will now determine the relief to be granted to the plaintiff. One of the relief prayed for by the plaintiff is damages for the tort of conspiracy and damages for libel. Applying the principle expounded in the case of *Ward v. Lewis* [1955] 1 WLR 9 (C.A.) the tort of conspiracy merges with the tort of defamation. The first relief is for damages.

In awarding damages, the evidence of the plaintiff's good character is irrelevant as the law presumes that he is a person of good character. According to **Gatley on Libel and Slander** (8th edition) at paragraph 1333:

> Evidence of the plaintiff's good character is, as a rule, irrelevant or unnecessary in an action of defamation, for the law presumes that his character is good until the contrary is proved and he can safely rest on that presumption.

Gatley on Libel and Slander (8th edition) at paragraph 1451 sets out the matters which ought to be taken into account in assessing damages:

> The amount of damages is 'peculiarly the province of the jury', who in assessing them will naturally be governed by all the circumstances of the particular case. They are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence of refusal of any retraction or apology, and 'the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in Court at the trial of the action', and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the case. They should allow "for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused. They should also take into account the evidence led in aggravation or mitigation of the damages.

In *Carson v. John Fairfax & Sons Ltd.* [1993] 113 ALR 577 at page 589 the High Court of Australia expounded the following principles of law:

> ... there are three purposes to be served by damages awarded for defamation. The three purposes no doubt overlap considerably in reality and ensure that "the amount of a verdict is the product of a mixture of inextricable considerations". The three purposes are consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant's personal and (if relevant) business reputation and vindication of the appellant's reputation. The first two purposes are frequently considered together and constiture consolation for the wrong done to the appellant. Vindication looks to the attitude of others to the appellant: **the sum awarded must be at least the minimum necessary to signal to the public the vindication of the appellant's reputation.** "The gravity of the libel, the social standing of the parties and the availability of alternative remedies" are all relevant to assessing the quantum of damages necessary to vindicate the appellant." (Emphasis is mine).

In *McCarey v. Associated Newspapers Ltd.* (No. 2) [1965] 2 QB 86 at 104-105 (C.A.) Pearson L.J. said:

> Compensatory damages, in a case in which they are at large, may include several different kinds of compensation to the injured plaintiff. They may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantages which result, or may be thought likely to result, from the wrong which has been done. They may also include the natural injury to his feelings - the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self-confidence, those are proper elements to be taken into account in case where the damages are at large.

Lord Hailsham L.C. in *Cassell & Co. v. Broome* [1972] 1 ALL ER 801 stated as follows:

> In case the libel, driven underground, emerges from its lurking place at some future date, [the plaintiff] must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge ... Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in litigation, the absence of apology, or the re-affirmation of the truth of the matters complained of, or the malice of the defendant.

Bouck J. noted in *Neeld v. Western Broadcasting Co.* [1976] 65 D.L.R (3d) 574 at 576

> The measure of damages must bear some relation to the actual standing and reputation of the plaintiffs in the community prior to the libel. The higher the prior to the reputation the greater the damages.

In the present case plaintiff is a prominent and successful businessman who is recognised not only in Malaysia but also internationally. The plaintiff had testified in Court that he has been very gravely and seriously injured in his reputation and personal standing in society. His fellow directors are now more cautious and less trusting of him. The shareholders and bankers have doubts of his professional integrity especially of the allegations on his under-counter dealings. The plaintiff in his sworn evidence said:

> I was very very upset, hurt and those articles had caused me great anxiety and stress because the allegations were very grave and serious ...
>
> All the four articles have injureed me in the following ways. It has affected my standing in the business community both nationally and internationally. My credibility and integrity and standing as the leading businessman has been severely tarnished and tainted. To my business partners and directors of all the companies I have associated, hence became more cautious and less trusting as

a result of these articles. Fund managers who invest in the shares of all companies in the Berjaya Group had become very concerned and less trusting and some of them have sold their holdings in the Berjaya Group. To bankers, my standing have been affected. I found more difficulty in getting loans and if I succeeded the interest rates were higher because my credit risk is percieved to be greater. To the shareholders of all the companies in Berjaya Group who read the articles were upset and some of them had sold their shares. To the general public my image and standing had been affected, tainted and subjected to ridicule ...

I am the businessman of national and international standing. I am well-known in Malaysia, Asia and North America. The damage done to me is very grave and serious. Therefore the quantum to be awarded must reflect the gravity of the libel and serve as vindication in my standing Malaysia and overseas ...

To me RM20 milllon is not a big money. If I am weak I would collapse ...

The seventh defendant had submitted evidence that 10,000 copies of the magazine were printed for distribution to the business community in Malaysia for each publication. This magazine is read by influential people in the business community including bankers, fund managers, company directors, shareholders and others. Therefore "it is impossible to track the scandal to know what quarters the poison may reach" as stated by Lord Diplock in *Broome v. Cassel & Co.* [1972] A.C. 1027 at page 1125 (H.L.) and account must be taken of "the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it (the libel) has done or the hurt it has caused ... " as Lord Radcliffe said in *Associated Newspapers v. Dingle* [1964] A.C. 371 at 399.

The contention by the plaintiff that the business of Berjaya Group of Companies had suffered through loss of business opportunities as a result of this libel is irrelevant because the companies are not the parties to this suit. It is the plaintiff alone who is claiming for damages.

In my opinion each case must be judged on its own particular facts and on its own merits. In the present case a very serious libel has been perpetrated on the plaintiff. The defendants calculated that the prospect of material advantage from publishing the said articles outweighed the prospects of material loss.

Therefore, bearing in mind the principles applicable in the assessment of damages and in considering all the various factors including the following:

(1) the position and standing of the plaintiff;

(2) the gravity and seriousness of the libel;

(3) the mode and extent of the publication;

(4) the mental distress, hurt, anxiety and mental anguish caused to the plaintiff as a result of the libel;

(5) the uncertainty undergone in litigation;

(6) the conduct of the defendants from the time of the libel down to the very moment of the verdict; and

(7) the absence or refusal of any correction, retraction or apology,

this Court finds that the award must also be sufficient to convince any person of the baselessness of the libel and act as a necessary and sufficient signal to the public at large of the full vindication of the plaintiff's reputation both in Malaysia and internationally. Taking the above into consideration, I am of the view that the damages to be awarded against each defendant must be treated individually.

Taking all these factors into account I will order the following:

(1) Against the first defendant: General damages of RM3 million.

(2) Against the second defendant: General damages of RM750,000.00.

(3) Against the third defendant: Against the third defendant this Court awards general and aggravated damages because the third defendant had relied on justification and fair comment which he failed to establish and he further repeated and aggravated the libel in Court. The House of Lords in *Cassell & Co. v. Broome* [1972] 1 ALL ER 801 stated that:

> In awarding "aggravate" a damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and as the result of the conduct exciting the indignation demands a more generous solatium.

Therefore this Court awards against the third defendant general and aggravated damages in the sum of RM2 million.

(4) Against the fourth defendant: General damages of RMl million.

(5) Against the fifth defendant: This Court has taken into account the fact that the fifth defendant had apologised three times in open court. Therefore the Court awards against the fifth defendant the sum of RM250,000.00 as general damages.

(6) Against the sixth defendant: General damages of RM2 million.

(7) Against the seventh defendant: The Court has taken into account the fact that the seventh defendant did not print the August 1993 issue of the said magazine. Taking into account the fact that the seventh defendant has pleaded justification and fair comment without any evidence whatsoever and applying the principle as stated by Lord Denning in *Associated Newspaper* case that where a plea of justification fails, damages which would be modest will become colossal, this Court awards against the seventh defendant the sum of RMl million as general damages.

(8) This Court also grants an injunction to restrain all the defendants each of them by themselves, their servants or agents, or in combination or otherwise howsoever from further publication and perpetration of the said libel or any similar or like libel of or concerning the plaintiff.

(9) Interest on the above sums at the rate of 8% per annum from the date of judgment to the date of full recovery.

(10) Costs to the plaintiff against all the defendants.